No. 88-1530

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH V. JULIANO,
Petitioner,
vs.
COMMERCIAL LIFE INSURANCE COMPANY
and AUTOMATIC DATA PROCESSING, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Petitioner, JOSEPH JULIANO, respectfully submits this reply brief pursuant to Supreme Court Rule 22.5.

SUPPLEMENTAL ARGUMENT

Since Petitioner, JOSEPH JULIANO, submitted his Petition for Writ of Certiorari, he has become aware of pending California legislation and recent Supreme Court opinions in other states contrary to the position taken by the California Supreme Court on the federal question of ERISA preemption. In addition, Petitioner files this reply in response to false and misleading argument presented by Respondents and in objection to

Respondents' attempt to introduce irrelevant hearsay evidence at the appellate level which is not in the record on appeal.

I.

THE CALIFORNIA STATE LEGISLATURE HAS BEFORE IT LEGISLATION WHICH, UNDER THE CALIFORNIA SUPREME COURT HOLDING IN THIS CASE, WOULD BE SUBJECT TO ERISA PREEMPTION EVEN THOUGH THE LEGISLATION REGULATES INSURANCE.

On March 9, 1989, Senators Marks and Rosenthal introduced legislation adding section 790.031 to the California Insurance Code. A copy of Senate Bill No. 1329 is attached as Appendix "A" to this reply brief. This legislation declares that the purpose of the Article is to regulate unfair insurance practices by creating a private cause of action to enforce the California Insurance Code. Remedies under this statute are not a claim for benefits under an employee benefit plan and are in addition to remedies provided under the Employee Retirement and Income Security Act (ERISA), 29 U.S.C. section 1001 *et seq.* This proposed law clearly regulates insurance by imposing a financial disincentive on insurance companies operating in California contrary to California law regulating insurance.

The proposed statute would specifically abrogate the recent California Supreme Court decision in *Moradi-Shalal v. Fireman's Fund Insurance Company*, 758 P.2d 58 (Cal. 1988), by recreating a private cause of action for violation of the state's insurance code as has been the law in California since 1979 when the California

Supreme Court decided *Royal Globe Insurance Company v. Superior Court*, 23 Cal.3d 880 (1979). If, however, as assumed by the California Supreme Court in the present case, even state laws regulating insurance are preempted by ERISA the Supreme Court has prospectively tied the hands of the legislature even before it attempts to perform its responsibility under the McCarran-Ferguson Act, 15 U.S.C. section 1012 *et seq.*, and as specifically saved from preemption by ERISA.

Thus, Respondents' brief in opposition asserting that this case will have minimum impact and is moot in light of *Moradi-Shalal* is false. The question presented in this petition is of ongoing and critical importance to the California Legislature, the Department of Insurance, and the citizens of California protected by California Insurance Code section 790.03(h).

II.

THE SUPREME COURTS OF NEVADA, LOUISIANA AND CALIFORNIA ARE IN CONFLICT, AND STATE SUPREME COURTS ARE IN NEED OF GUIDANCE FROM THIS COURT TO UNIFORMLY APPLY THE LAW THIS COURT SET FORTH IN *PILOT LIFE v. DEDEAUX*.

The California Supreme Court's decision in this case is not correct and is in direct conflict with the results reached by Supreme Courts in other jurisdictions.[1]

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[1] Respondent declares that the California Supreme Court's decision in this case is supported by all available precedent. To the contrary, in the murky waters of ERISA preemption swallowing up the time and resources of state and federal courts across the nation since the *Pilot Life* decision the results have been inconsistent and the rules

(continued)

On January 30, 1989, the Louisiana Supreme Court found that ERISA did not preempt a Louisiana statute even though plaintiff's complaint clearly stated a cause of action for recovery of benefits under both ERISA and Louisiana law. *Soniat v. Travelers*, La. No. 87-C-2705, 1989 La. Lexis 98 (La. 1989)

On December 21, 1988, the Nevada Supreme Court held that the owner of a liquor store who had purchased health insurance for herself and her employees had not created an employee benefit plan subject to ERISA preemption and, therefore, her state law claims were not preempted. *Turnbow v. Pacific Mutual Life Ins. Co.*, 765 P.2d 1160 (Nev. 1988)

As set forth in the analysis submitted by the California Attorney General in the amicus curiae brief filed supporting JULIANO's petition for writ of certiorari, it is clear that the Attorney General feels the *Juliano* decision precludes regulation of insurance by both the State Legislature and the Department of Insurance. This result is completely contrary to the statutory scheme set up by ERISA. The Department of

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(ftn. continued)
applied willynilly in an astounding array of result-orientated decisions. In fact, the principal case cited by the Respondent, *Kanne v. Connecticut General Life Insurance Company*, 867 F.2d 489 (9th Cir. 1989), is currently pending on writ of certiorari before this Court. Counsel of record for Connecticut General Life Insurance Company opposing Kanne's Petition for Writ of Certiorari is counsel of record *filing* the Petition for Writ of Certiorari by Pacific Mutual Life Insurance Company in *Turnbow* from the Supreme Court of Nevada also pending before this Court, this term. The reason for this apparent hypocrisy is obvious: In California the insurance company won, in Nevada the insurance company lost. The seriousness of the question presented as to the scope of the preemption announced in *Pilot Life* is no different in Nevada than in California.

Labor is completely incapable by expertise, resources, and by law, of regulating insurance in the different states.[2]

Two recent opinions by this Honorable Supreme Court reflect the urgency with which this Court should revisit some of the unanswered questions left by *Pilot Life Ins. Co. v. Dedeaux*, 107 S.Ct. 1549 (1987). *California, et al. v. ARC America Corp., et al.*, No. 87-1862, decided April 18, 1989 on appeal from the United States Court of Appeals for the Ninth Circuit held federal preemption of antitrust recoveries did not require preemption of a state law which created a remedy for violation of state antitrust laws. This Court found that the state laws were not inconsistent with and did not act as an obstacle to the Congressional purposes served by federal antitrust preemption. The same analysis should apply to a state law which permits a private cause of action to enforce state regulation of insurance as the regulation applies to insurance companies who sell policies to employers operating within the state. Just as in *California v. ARC, supra*, where state court remedies for antitrust violation did not violate the

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[2] The McCarran-Ferguson Act and the Employee Retirement and Income Security Act both assume regulation of insurance is left at the state level. A review of the rules and regulations set out by the Department of Labor as well as a review of the opinions of the Department of Labor reveal that the Department of Labor has not and is not prepared to handle the highly complex and technical regulation of insurance. Making the Department of Labor in charge of the regulation of insurance by binding a state's civil enforcement of its insurance code to ERISA preemption would be the same as putting the Department of Labor in charge of the regulation of banking and securities where an employee benefit fund maintains a bank account or obtains investments for the fund. The Department of Labor should regulate labor, not insurance, not banking, and not securities.

purposes of federal antitrust law, state court remedies enforcing state insurance law do not interfere with the federal purpose underlying ERISA. These state laws cannot and do not purport to affect any of the principal concerns addressed by ERISA. As set forth in numerous decisions of this Court and referenced in JULIANO's Petition for Writ of Certiorari, the principal purpose for the establishment of uniform national regulation of employee benefit plans was to prevent widespread abuse by pension plan trustees and to safeguard funds set aside to provide retirement income. Claims under the state insurance statutes do not affect the cost or administration of employee benefit plans because the risk of violating the state statute is not upon the employer or the plan, the risk is on the insurance company who sells a product at a fixed price to all group purchasers in the state.

Also on April 18, 1989, this Court issued its decision in *Massachusetts v. Morash*, No. 88-32:

> In enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds. [Citation.] Tc that end, it has established extensive reporting, disclosure, and fiduciary duty requirements to insure against the possibility that the employee's expectation of the benefit would be defeated through poor management by the plan administrator. Because ordinary vacation payments are typically fixed, due at known times, and do not depend on contingencies outside the employee's control, they present none of the risks that ERISA is intended to address. If there is a danger of defeated expectations, it is no different from the danger of defeated expectations of

> wages for services performed — a danger Congress chose not to regulate in ERISA.

Similarly, as between the employer and the insurance company providing group policy benefits, a state law remedy which regulates insurance by creating a financial disincentive for violation of a state's insurance laws does not affect the management of funds accumulated to finance employee benefits nor does it affect the failure to pay employee benefits from accumulated funds. In the insurance context, the employer pays a fixed insurance premium, determined by the market place and an underwriter's assessment of the potential risk for medical expenses: contingencies outside both the employee's and the employer's control. In the insurance context, an insurance company offers coverage in exchange for premium. The business of the insurance company then depends upon the successful investment of this premium and the accuracy with which the actuary has predicted, and reserved for, claims. Thus, benefit payments are not made by plan funds and an insurance company's liability outside the terms of the contract do not affect the integrity of the plan funds. Congress specifically chose not to get involved in the regulation of this cost-risk assessment and left it up to the individual states in both the McCarran-Ferguson Act and in ERISA.

Of additional concern in *Morash*, was the extension of ERISA preemption to claims which would vastly expand the jurisdiction of the federal courts and provide a federal forum for any employee with a grievance based on a state law concerning vacation benefits because most employers in the United States provide some type of vacation benefit. Similarly, most employers purchase group insurance policies for their employees. A survey performed in 1988 shows that 84% of employers insure employees' health care either by direct underwriting with an insurance company or by self-funding with a

stop-loss insured by an insurance company.[3] (See 1988 Foster, Higgins Health Care Benefits Survey 23.)

Until *Juliano*, California courts routinely settled disputes between an employee and an insurance company involving payment of medical bills. Since the employee had a direct claim against the insurance company for violation of the state insurance code, the employer often was not even a party to the suit. Indeed, it is easy to see an employee's reluctance to sue his employer when the wrongdoer is not the employer or the plan fiduciary, but is an independent financially-motivated insurance company. ERISA was designed to give workers access to the courthouse, not a shove out the door of employment. Frequently, these disputes do not involve large sums of money, if the state court verdict exceeds the amount of benefits due for the medical claim it is because a court has found that the insurance company has violated the state's law regulating insurance.

State court remedies against an insurance company for violation of the Insurance Code cannot be assessed against an employee benefit plan. (See Juliano's Petition for Writ of Certiorari, pages 17-21.) Therefore, if the insurance company is sanctioned by a state court for violation of state insurance law, neither the integrity of the plan, nor the assets of the fund, are affected. ERISA preemption of a claim for benefits under an ERISA plan applies to a claim for medical benefits where the plan is self-funded. Such a result is consistent with Congress' intention to protect funds available to pay employee

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[3] The importance of this issue to health care in California can be seen in the Motion to File and Amicus Curiae brief filed by the California Medical Association in support of Juliano's Petition for Writ of Certiorari.

benefits and Congressional intent to save regulation of insurance from federal preemption.

III.

RESPONDENTS' ARGUMENT THAT THIS CASE IS NOT RIPE IS FALSE AND IMPROPERLY ASKS THIS COURT TO CONSIDER EVIDENCE WHICH IS NOT IN THE RECORD.

In an extremely improper and highly prejudicial manner, Respondents attempt to introduce for the first time, unverified, hearsay, irrelevant evidence which does not appear in the record before this Court. Citing cases which have no application and which do not stand for the proposition that this Court can consider the appendixes attached, Respondents attempt to create a smoke screen hiding the very real issues presented in this petition. Petitioner respectfully requests this Court ignore this improper and prejudicial tactic.

IV.

CONCLUSION

For the reasons set forth in this brief, the Petition for Writ of Certiorari and the amicus curiae brief filed by the California Attorney General, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Dated April 28, 1989, Claremont, California.

Respectfully submitted,

SHERNOFF, SCOTT & BIDART

By: MARIAN HAYCOCK TULLY

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